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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-

76-1571

MARTHA WILEY, MOTHER AND NEXT OF KIN OF FRED LEE BERRY, A DECEASED MINOR,
Petitioner,

v.

MEMPHIS POLICE DEPARTMENT, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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MEMPHIS POLICE DEPARTMENT, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on February 10, 1977.

OPINIONS BELOW

The opinion of the District Court for the Western District of Tennessee has not been officially published and appears at page 16a as Appendix B to this Petition. (All references to Appendices to this petition are here-

after preceded by the designation "A".) The opinion of the Sixth Circuit Court of Appeals, decided February 10, 1977, affirming the district court, is reported at 548 F.2d 1247 and is printed as Appendix A hereto (A. 1a).

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered February 10, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The deadly force policy of the City of Memphis Police Department, at the time in question, authorized the City's police officers to use any force deemed necessary to effect the arrest of any felony suspect even if the suspect were not reasonably perceived to pose a threat to the life or bodily security of the arresting officer or other persons. Pursuant to this policy, petitioner's minor son was killed by a shotgun blast while fleeing from the scene of a burglary of an unoccupied business establishment; he posed no threat to the life or bodily security of the arresting officers or other persons.

The questions presented are:

1. Whether the deadly force policy of the City of Memphis and the conduct of the City's officers pursuant to that policy, which caused the death of petitioner's son, are unconstitutional:

> (a) Under the Fourteenth Amendment's Due Process and Equal Protection Clauses because the use of deadly force under the circumstances of this case denied fundamental constitutional rights to life and to a trial;
>
> (b) Under the Eighth Amendment because the use of deadly force against a nonviolent property crime suspect constitutes cruel and unusual punishment;

> (c) Under the Fourth Amendment because the use of deadly force under the circumstances of this case constituted an unreasonable seizure?

2. Whether uncontroverted evidence that the Memphis deadly force policy is implemented disproportionately against Negro property crime suspects, in conjunction with undenied evidence of pervasive racial discrimination in the employment and law enforcement practices of the Memphis Police Department, creates a prima facie case of racial discrimination under the Equal Protection Clause and 42 U.S.C. § 1981 which shifts the burden of proof to respondents?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved in the case are the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Fourth and Eighth Amendments. The policy of the Memphis Police Department challenged by petitioner was found by the courts below to be authorized by

TENN. CODE ANN. § 40-808:

> If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest.

STATEMENT OF CASE

Procedural Background

Petitioner Martha Wiley, mother and next of kin of Fred Lee Berry, a 16-year-old Negro youth shot and killed by Memphis police officers, initiated this action by complaint filed January 8, 1973, in the United States District Court for the Western District of Tennessee

(CA A. 5-17).[1] Mrs. Wiley named as defendants the Memphis Police Department ("MPD"); the City of Memphis, Tennessee ("City"); Chief of Police Bill Price (since retired); former Chief of Police Henry Lux; Wyeth Chandler, Mayor of Memphis; Henry Loeb, a former Mayor of Memphis; M. J. Calliham, R. D. Roleson, B. G. Cox and J. K. Richards, police officers of the MPD; W. W. Wannamaker and Jewell G. Ray, supervisory officials of the MPD; and "John Doe and others similarly situated."[2]

Petitioner invoked the district court's jurisdiction under 28 U.S.C. §§ 1331(a), 1343(3) and 1343(4) for alleged causes of action arising under 42 U.S.C. §§ 1981, 1983, 1985, 1986 and 1988 and the Fourth, Fifth, Sixth, Eighth, Thirteenth and Fourteenth Amendments to the United States Constitution. She prayed for declaratory relief (28 U.S.C. §§ 2201, 2202) and money damages for the personal effects and wrongful death of her son. Petitioner also invoked the court's pendent jurisdiction alleging causes of action under Tennessee law.

Trial to the court was held April 2, 3, 7 and 8, 1975. The district court filed a memorandum opinion June 30, 1975 (CA A. 236) and amended the opinion by order of July 25, 1975 (CA A. 263) (the amended memorandum opinion appears as Appendix B hereto). Judgment was entered in favor of all defendants. A timely appeal was taken to the Sixth Circuit Court of Appeals which affirmed the district court by opinion filed February 10, 1977.

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[1] "CA A." refers to the Appendix filed in the Court of Appeals, which includes, *inter alia*, most of the trial testimony and exhibits.

[2] By consent orders, defendants Calliham, Roleson, Wannamaker, Ray and Loeb were dismissed prior to trial (CA A. 47, 53), and at the commencement of trial plaintiff agreed to the dismissal of the "John Doe" defendants (CA A. 58).

Statement of Facts

Petitioner's son, Fred Lee Berry, was sixteen years old at the time of his death (CA A. 62). He was five feet four inches tall and weighed 118 pounds (CA A. 270).

On January 8, 1972, shortly after 8:00 p.m., the police dispatcher for the MPD's South Precinct put out a call: "Bellevue and Ferguson at sporting goods, prowlers inside." (CA A. 287). Officers Calliham and Roleson responded to the call and were the first to arrive on the scene (CA A. 288). Approximately 30 seconds later, officers Cox and Richards arrived on the scene (CA A. 288).

The scene was South Bellevue Marine Company ("SBM Co."), a sporting goods store specializing in boats, boat motors and other marine equipment (A. 19a n.4). SBM Co. is located at the corner of Ferguson Street (running east-west) and South Bellevue Street, also known as Elvis Presley Boulevard (a major north-south thoroughfare). The main entrance to SBM Co. is on South Bellevue. There is a storage yard in the back (to the east) which extends to the northeast of the building fronting on South Bellevue and runs along Ferguson (CA A. 563). The storage yard is bordered by a chain-link cyclone fence approximately six feet high with barbed wire on top. The fence separates the storage yard from a large drainage ditch, an open concrete culvert, which runs north-south at the back of the SBM Co. property. There is a similar fence separating Ferguson Street from the drainage ditch at the point where the street crosses the drainage ditch (CA A. 563). Officers Cox and Richards were familiar with this scene from prior experiences (CA A. 67-71, 73-77, 227-29).

When officers Calliham and Roleson arrived on the scene, they stopped their patrol car directly in front of SBM Co. Calliham went to the front door and Roleson

began running south in front of the building for the purpose of circling around behind the building. The interior of SBM Co was well-lighted, and through the glass door and display windows Calliham could see three Negro males inside trying to break into a drink machine (CA A. 503-04). At this point officers Cox and Richards arrived and were told by Calliham that "There's three inside." (CA A. 470). Calliham instructed Cox and Richards to go to the back of the building. As Calliham testified, "Then I went to the front and hollered at the boys to come on out. They looked up and saw me and took off every direction." (CA A. 504).

Cox and Richards drove north on Bellevue and turned east on Ferguson, stopping their car near the drainage ditch. As Cox and Richards were getting out of the car, they saw two male Negroes running from the rear of the south portion of the building near the fence which separates the storage yard from an adjoining parking lot (CA A. 563). Although it was raining, the storage yard was lighted and Cox and Richards, standing at the east-west fence on Ferguson Street, could see the youths clearly. The two youths either climbed over or went under the north-south fence into the drainage ditch (CA A. 80-82). Richards and/or Cox yelled "halt" several times as Fred Berry and his companion continued running into and then south in the drainage ditch away from the officers (CA A. 79). When the youths did not obey the commands to stop, Cox and Richards concluded that they could not apprehend the suspects without shooting them. In Richards' words, "[W]hen we saw it [yelling commands to halt] wasn't going to work, I looked at him [Cox] and he looked at me and we immediately started [firing]." (CA A. 86).

Cox fired twice with his .38 caliber police special pistol loaded with MPD standard-issue hollow point bullets (CA A. 204-05), and Richards fired three time with a .12 gauge shotgun loaded with 00 buckshot (each shotgun shell

contains 9 "shot" of about .32 caliber) (CA A. 205). Fred Berry fell critically wounded in the ditch 208 feet from where Cox and Richards had fired (CA A. 563). Berry died at the hospital shortly thereafter of a "gunshot wound to the brain." (CA A. 268). He had also received a gunshot "graze" on the chin. It was determined that the fatal wound was from a shotgun shot (CA A. 286).[3]

Officers Cox and Richards acted pursuant to the MPD's deadly force policy which, at the time of Fred Berry's death, authorized the use of deadly force as a last resort, to apprehend *any* felony suspect (A. 24a-26a). The district court found that by January 8, 1972, MPD had distributed generally to line officers only two instructive statements concerning the propriety of using deadly force. The rules and regulations manual prepared in 1961 by defendant Lux, former Chief (then Assistant Chief) of Police, contained one such statement. The district court stated that the manual "cryptically specified" (A. 24a) that "[n]o member of the Department shall intentionally fire any weapon except as authorized by law." (CA A. 315 at § 4.113).[4] In 1969 Chief Lux issued, in response

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[3] The suspect with Fred Berry was not apprehended, but turned himself in at police headquarters the next day (CA A. 300). He was 17 years old, and was subsequently adjudicated delinquent by the Juvenile Court and placed on probation (CA A. 302). The third youth, age 18, had hidden inside the SBM Co. building where he was apprehended with the aid of a police dog brought to the scene shortly after the shooting. It is not known what legal disposition was made of the burglary charges brought against the third youth (CA A. 299, 301).

[4] A more detailed manual was maintained at the administrative level but not issued to patrolmen (A. 25a). This document, as corrected on March 7, 1967, stated that officers had "the right to use force or devices dangerous to human life, only in *self-defense*, or the arrest of a Felon. *Never in misdemeanors*, and the taking of life is justified only in cases of extreme necessity." (CA A. 318 at § 80.11(6)) (emphasis in original).

On July 7, 1969, Chief Lux issued a communication to "All Commanding Officers" respecting the firing of warning shots. This

to "considerable publicity recently in the newspapers regarding alleged 'police brutality' ", a departmental communication to "all personnel" which quoted Section 40-808 [5] of the Tennessee Code and advised that deadly force was authorized to arrest felons but not misdemeanants (CA A. 449-51). There were no other formal guidelines or instructions on the use of deadly force in existence prior to or on January 8, 1972 (A. 26a).[6] The Memphis policy has never distinguished between adult and juvenile suspects in authorizing the use of deadly force (CA A. 118).

The district court found that instruction of police officers, including Cox and Richards, was generally in

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memorandum added that "Generally the firing of a weapon constitutes the use of deadly force. Deadly force should be used only when *necessary* to effect the arrest of a felon, prevent the commission of a felony or when necessary in self defense." (CA A. 320) (emphasis in original).

[5] Section 40-808 was first adopted as § 5040 of the Tennessee Code of 1858. It reads:

> If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest.

This statute has been construed correctly as a simple codification of the common-law rule allowing the use of deadly force to arrest any felony suspect. *Cunningham* v. *Ellington*, 323 F. Supp. 1072 (W.D. Tenn. 1971) (three-judge court). Although the statute broadly authorizes the use of deadly force against all criminal suspects, the Tennessee Supreme Court has construed the language as adopting the common-law felony/misdemeanor distinction. *Reneau* v. *State*, 70 Tenn. 720 (1879); *Love* v. *Bass*, 238 S.W. 94 (Tenn. 1922); *Johnson* v. *State*, 114 S.W. 2d 819 (Tenn. 1938).

[6] Fred Berry was the first of four Negro suspects, three of whom were killed, shot by Memphis police officers in January 1972 (CA A. 216). As a consequence, a new deadly force policy, which narrowed the facial breadth of the common-law rule and the state statute, was issued January 20, 1972 (CA A. 322). In practical effect, the new policy merely eliminated auto theft suspects from the class of fleeing felony suspects against whom deadly force could be used. A subsequent policy issued February 5, 1974, eliminated grand larceny suspects from the class (CA A. 325). Authorization to shoot burglary suspects like Fred Berry continues in effect.

accord with the MPD communications described above (A. 26a). Cox and Richards testified that they shot with specific intent to kill, and that they had been trained to "shoot to kill" whenever they used their firearms (CA A. 218, 471-72, 495-96).[7] Both officers also testified that, from their experience with the SBM Co., they knew that neither the proprietor nor any of his employees were in the building at that time of night (CA A. 223-24, 227-29), and that they had no reason to believe that Fred Berry or his companion were armed or presented a threat to human life (CA A. 219-22).[8] The two youths were

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[7] As the district court noted, a factual dispute exists as to whether officers were trained to shoot to kill (A. 23a). Cox and Richards so testified, but former Chief Lux vehemently disputed their testimony. The district court did not resolve this factual dispute.

[8] Contrary to statements in the court of appeals' opinions (A. 9a, 15a), there were absolutely no facts adduced at trial from which it could be reasonably inferred that Berry and his companion presented a threat to human life or were perceived by the officers as an apparent threat. The majority opinion of the court of appeals states that the officers knew that SBM Co. sold weapons and that a " 'stash' of stolen arms and ammunition was found near the body of Berry. . . ." (A. 9a). There was no evidence whatever that SBM Co. sold weapons or that the officers thought it did. Two shotguns, one in a gun case, but no ammunition were found in the drainage ditch. The preliminary police report, which was a trial exhibit but only excerpts of which were in the Appendix in the court of appeals, states that the shotguns were identified as belonging to R. Hoffman. R. Hoffman is the brother of the proprietor of SBM Co. and operates the R. Hoffman Golf Equipment Company which is adjacent to SBM Co. (Exhibit 6 N, 2-3). There was no factual dispute on this question prior to the time the court of appeals made its own factual findings based on little other than erroneous supposition. Record testimony indicates that there was enough light as the youths fled the SBM Co. for Richards and Cox to make out their race, their size and the color of their clothing (CA A. 81), and to see that the youths were not carrying the shotguns (CA A. 222). The officers subsequently assumed that the shotguns had been brought out of the building at some other time (CA A. 222). There has never been a claim by any of the respondents in this case that deadly force was employed against petitioner's son either in self-defense or because of a perceived threat to the life or bodily security of any other person.

running away from Cox and Richards and were separated from the officers by aproximately 200 feet when Cox and Richards aimed at the backs of the youths. Cox and Richards asserted that they opened fire as the only means of effecting the arrest of the burglary suspects (CA A. 85, 230). The district court found that "it was reasonable to believe that the crime involved was one against property and not against other persons." (A. 28a).

Decisions Below

The district court's memorandum opinion of June 30, 1975, recites the findings of fact surrounding the death of petitioner's son (A. 19a-23a). On the basis of these findings, the court concluded that Cox and Richards reasonably believed it necessary to shoot Fred Berry to prevent his escape. The court concluded that the officers had not acted contrary to Tennessee law and, accordingly, the pendent state law claims were denied. This holding was not contested on appeal.

The district court denied petitioner's request for a declaratory judgment that the MPD's deadly force policy, as applied to and resulting in the death of petitioner's son, is unconstitutional under the Fourth, Eighth or Fourteenth Amendments. The court also held that petitioner failed to prove unlawful racial discrimination and declined to find subject matter jurisdiction under 28 U.S.C § 1331(a).

The Sixth Circuit Court of Appeals decided that the district court's ruling on the jurisdictional issue under 28 U.S.C. § 1331(a) was erroneous, but affirmed on all other issues. The majority of the court of appeals expressly rejected the reasoning of the Eighth Circuit in *Mattis* v. *Schnarr*, 547 F.2d 1007 (1976), on all issues. The opinion of the Sixth Circuit below (1) appears to conclude that all constitutional issues raised had been decided adversely to petitioner in *Cunningham* v. *Ellington*,

323 F. Supp. 1072 (W.D. Tenn. 1971) (three-judge court) and *Beech* v. *Melancon*, 465 F.2d 425 (6th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973) (A. 7a-8a), (2) finds that the police officers acted reasonably in the face of an apparent threat to their welfare, a view which is based on the appellate court's erroneous factual conclusions (A. 9a and 12a), (3) expresses the view that the use of deadly force is a question for the state legislature (A. 6a), and (4) concludes that all defendants "had the same right to rely" on the presumption of constitutionality of Tennessee law and on the prior decisions considering the issue (A. 9a, 13a-14a). In addition, the court of appeals concluded that the district court's rejection of the racial discrimination claims was not clearly erroneous (A. 15a).

REASONS FOR GRANTING CERTIORARI

The Sixth Circuit's opinion in this case is in direct and acknowledged conflict with the Eighth Circuit's opinion in *Mattis* v. *Schnarr*, 547 F.2d 1007 (1976), *appeal pending, sub nom., Ashcroft* v. *Mattis*, No. 76-1179, on the issue of the constitutionality of the use of deadly force by police for the *sole* purpose of apprehending a person suspected of commission of a property crime who poses no threat to the life or bodily security of the arresting officers or others.[9] The Eighth Circuit in *Mattis*

[9] Other than *Mattis* and prior Sixth Circuit opinions, petitioner is not aware of other cases which have directly considered the constitutional issues presented herein, although there has been considerable litigation and commentary over the last fifty years respecting the issue generally. Several federal and state cases have considered defenses or immunities to damage suits brought against policemen exercising deadly force, but the cases do not reach the merits of any constitutional challenge. *See, e.g., Jones* v. *Marshall*, 528 F.2d 132 (2d Cir. 1975); *Wolfer* v. *Thaler*, 525 F.2d 977 (5th Cir. 1976); *Schumann* v. *McGinn*, 240 N.W. 2d 525 (Minn. 1976); *Hilton* v. *State*, 348 A.2d 242 (Me. 1975); *Kortum* v. *Alkire*, 1 Civil No. 38947 (Cal. Ct. App., filed April 26, 1977). *Cf. Autry* v. *Mitchell*, 420 F. Supp. 967 (E.D.N.C. 1976) (three-judge

concluded that a Missouri statute [10] permitting such use of deadly force violated the Due Process Clause of the Fourteenth Amendment.[11] The Sixth Circuit in this case found that application of the MPD deadly force policy to petitioner's son, resulting in his death, contravened no constitutional or statutory provision. Apart from the conflict between circuit courts, the issue is of substantial importance in light of the number of states with similar policies and the number of deaths that have resulted and

court) holding unconstitutional on due process and equal protection grounds a statute permitting the killing of any felon against whom there had been an an ex parte proclamation of outlawry.

[10] The Missouri statute, V.A.M.S. § 559.040 is identical to TENN. CODE ANN. § 40-808. It should be noted that petitioner did not directly challenge the Tennessee statute, but rather the policy of the Memphis Police Department which is consistent with the Tennessee statute. Petitioner believes that the constitutional issues presented in *Mattis* and the instant case are identical. There is, however, a difference which potentially affects the damage liability of respondents in their individual capacities. Section 40-808 of the Tennessee Code is not mandatory in nature, and Tennessee municipalities (including Memphis, but after the event here) have adopted local rules governing deadly force that severely restrict the breadth of the state statute (*e.g.*, the Knoxville policy, CA A. 426). The good-faith defense available to the official respondents, with respect to potential liability in their individual capacities, is therefore less forceful than would be a defense predicated on an obligatory state statute. Of course, this distinction is not relevant to the liability of respondents (including the City) in their official capacities, and the difference therefore has no bearing on the questions presented for review by this Court. Moreover, there will never be a need to consider the nature of defenses available to respondents until there has been a declaration of unconstitutionality. Should petitioner prevail on the constitutional issues, the district court will be the proper forum for consideration, in the first instance, of respondents' defenses to monetary liability.

[11] The court in *Mattis* pretermitted questions under the Fourth and Eighth Amendments and the Fourteenth Amendment's Equal Protection Clause in light of its disposition of the case on due process grounds.

are likely to result from application of deadly force policies.[12]

Due to the imprecise and confusing nature of the opinion below, it is necessary to note what issues are not involved in this petition. Petitioner has never made any claim respecting the use of deadly force against a suspect who forcibly resists arrest or who poses a threat to the life or bodily security of the arresting officers or other persons. The facts of this case do not raise that issue and petitioner has not challenged the constitutionality of using deadly force under such circumstances.[13] This case also does not present the question of the constitutionality of using deadly force to apprehend persons suspected of forcible felonies or felonies involving violence. The only issue presented here is the constitution-

[12] Twenty-four states have codified the common law in permitting the use of deadly force to arrest any felony suspect. Seven states have modified the common law by limiting the use of deadly force to arrest suspects of "forcible felonies." Seven other states have adopted the Model Penal Code which prohibits the use of deadly force to arrest for nonviolent felonies. Comment, 11 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 361, 368-69 (1976); *Mattis* v. *Schnarr*, *supra*, 547 F.2d 1007, 1012-13. Petitioner has been unable to ascertain the total number of instances when deadly force has been used to arrest property crime suspects. However, between 1966 and 1974, MPD records show that MPD officers used deadly force against unarmed burglary, auto theft and larceny suspects in 114 instances. Between 1966 and 1974 the use of such force resulted in the death of 17 burglary suspects in Memphis alone (Appendix A to petitioner's brief in the court of appeals based upon data in the record compiled by respondents). A 1970 national compilation of 329 deaths due to "legal intervention by firearm" covers the use of deadly force in all situations resulting in death and excludes nonfatal incidents. 2 U.S. CENSUS BUREAU, VITAL STATISTICS OF THE UNITED STATES, Table 1-23, at 1-166 (1970). *See also Mattis* v. *Schnarr*, *supra*, 547 F.2d 1007, 1014 n. 15.

[13] As the record, the district court opinion and the statement of facts indicate, suggestions in the court of appeals' opinions that the fleeing suspects in this case presented an apparent threat to human life are simply erroneous, and respondents have never made any such claim.

ality of using deadly force against a property crime suspect, who was not engaged in violence, for the *sole* purpose of effecting his arrest.

In addition to the conflict between the circuits, there are compelling reasons why this case should be given plenary consideration irrespective of the disposition of *Ashcroft* v. *Mattis*, No. 76-1179. Only declaratory relief is involved in *Mattis*; the claim for damages was dropped after the case was first remanded to the district court (547 F.2d 1007, 1010 n.4). Petitioner herein seeks a declaratory judgment in part as a predicate to a claim for damages under the Constitution and the civil rights statutes.[14] In *Mattis*, appellee asserted a right to parenthood which was found to encompass the right to raise the constitutional deprivations of appellee's son (547 F. 2d 1017 n.22). Although petitioner herein is the mother of Fred Berry, neither the district court nor the court of appeals found it necessary to address this issue in view of the nature of petitioner's constitutional claims; accordingly, no similar question of standing is implicated here. In the instant case a Fourth Amendment claim has been asserted in each court below, whereas that issue was not advanced by appellee Mattis in the Eighth Circuit. Petitioner herein asserts an additional equal protection issue, on the basis of race, which is not found in the *Mattis* appeal. Finally, this case, unlike *Mattis*, presents a complete record, explicated by testimony of high-ranking police and municipal officials, revealing that there are no legitimate law-enforcement or other state interests served by the deadly force policy here at issue. For these reasons it is submitted that a

[14] The district court addressed the damage liability of officers Cox and Richards without resolving factual disputes which would determine whether the good-faith defense was available to them. See n. 7, *supra*. A remand to the district court would be necessary for consideration of the damage liability of other defendants if petitioner is entitled to declaratory relief.

writ of certiorari should issue to the Sixth Circuit whether or not probable jurisdiction is noted in *Ashcroft* v. *Mattis*.

1. The act of deadly force which caused the death of petitioner's son deprived him of two fundamental rights —the right to life and the right to a trial. As stated by this Court, the test for determining if an asserted right is fundamental is whether it is "explicitly or implicitly guaranteed by the Constitution." *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 33 (1973). The right to life is expressly guaranteed by the Due Process Clauses of the Fifth and Fourteenth Amendments. A right to life has long been recognized as fundamental in due process and equal protection cases.[15] More recently, in *Roe* v. *Wade*, 410 U.S. 113, 157 (1973), in the context of deciding a woman's right to an abortion, the court declared that the right to life is "guaranteed specifically" by the Fourteenth Amendment. The right to trial or the right not to be deprived of life without due process accorded by trial has been identified as fundamental as far back as *Palko* v. *Connecticut*, 302 U.S. 319, 327 (1937). Shooting to death a fleeing suspect thus interdicts two fundamental rights.

Decisions of this Court—*Roe* v. *Wade*, *supra*, 410 U.S. at 153-55 and *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 640 (1974)—set forth a constitutional framework for judging whether certain state action impinges upon fundamental rights. Clearly though rights are fundamental, there may be circumstances where the state interests are so compelling as to override those rights.

[15] *See e.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886) ("the fundamental rights to life, liberty, and the pursuit of happiness"); *Johnson* v. *Zerbst*, 304 U.S. 458, 462 (1938) ("fundamental human right of life and liberty"); *Screws* v. *United States*, 325 U.S. 91, 113, 131 (1945) (Rutledge, J., concurring) (life is among the "clear-cut fundamental rights").

However, it is the state's burden to demonstrate that the statute or policy in question is "narrowly drawn to express only the legitimate state interests at stake." *Roe* v. *Wade*, *supra*, 410 U.S. at 155. This analysis properly requires a balancing of interests. The Eighth Circuit in *Mattis* struck that balance and concluded that the state could not demonstrate any interest equal to or greater than the right to life to justify the use of deadly force against fleeing property crime suspects who pose no threat to human life or bodily safety. Moreover, the Eighth Circuit found that the Missouri statute created an impermissible conclusive presumption that all fleeing felony suspects pose a danger to the bodily security of arresting officers and others (547 F.2d at 1019).

The Sixth Circuit opinion in the instant case contains no discussion of the due process issue. Although the issue was extensively briefed and argued in the district court and in the court of appeals, the Sixth Circuit summarily disposed of the argument by citation to *Cunningham* v. *Ellington*, *supra*, 323 F. Supp. 1072 and *Beech* v. *Melancon*, *supra*, 465 F.2d 425, neither of which addressed the due process issue presented in this case. In *Cunningham* the court rejected an Eighth Amendment argument under the Cruel and Unusual Punishments Clause, denied relief on grounds of overbreadth and vagueness under the Due Process Clause, and rejected an equal protection claim. 323 F. Supp. 1072, 1075. *Beech* cited *Cunningham* without discussion of the due process issue.[16]

[16] In a concurring opinion in *Beech*, Judge McCree stated that he did not feel it necessary to reach the constitutionality of the deadly force policy as applied to a suspect who "has not committed a crime that poses a threat of death or serious bodily harm to other persons, and has not indicated by his subsequent behavior in avoiding arrest that he will pose a similar threat to members of the community if he is allowed to escape." 465 F.2d at 426. Judge McCree further stated that he would

> find it difficult to uphold as constitutional a statute that allowed police officers to shoot, after an unheeded warning to halt, a fleeing income tax evader, antitrust law violator, selective service delinquent, or other person whose arrest might be sought for the commission of any one of a variety of other felonies of a type not normally involving danger of death or serious bodily harm.

465 F.2d at 426-27. Judge McCree wrote a similar concurrence in the instant case (A. 15a). This position is somewhat enigmatic since the statute in *Beech* and the policy in the instant case do allow the shooting of such criminal suspects. The only basis for the distinction made can be the presumption that all burglary suspects are violent whereas none of the felony suspects listed by Judge McCree are. This presumption is rebutted by the facts of the instant case and other cases. Moreover, where a state's justification for a policy impinging on fundamental rights is based on an irrebuttable presumption, this Court has not hesitated to find a violation of due process. *E.g.*, *Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 644 (1974); *Vlandis* v. *Kline*, 412 U.S. 441, 446 (1973).

The court below did not discuss the justification for the deadly force policy other than to speculate that the officers' lives had been placed in danger (A. 12a). Were this in fact true based on the record of this case, no constitutional issue would be presented. But as pointed out, *supra*, at 8-10, such speculation is contrary to and without a particle of support in the evidence of record. The district court found that the "crime involved was one against property and not against other persons" (A. 28a) and that Cox and Richards fired because "the officers had no reasonable means to pursue the fleeing felons with any feasible expectation of effecting their apprehension." (A. 31a).

The reasons offered by respondents as justification for the deadly force policy were the existence of the common-law rule (CA A. 130-38), a claim of deterrence (CA A. 103-08, 137-38, 520-21), also mentioned by the district court (A. 28a), and the presumption that all property crime suspects pose a threat of violence (CA

A. 100-02, 544-45). The Eighth Circuit in *Mattis* correctly concluded that such claimed state interests are not sufficiently compelling to override the fundamental rights to life or to a trial (547 F.2d at 1019). If the MPD deadly force policy is used to deter crime or to prevent suspected felons from committing future crimes, then the City has deployed its police officers "to take the law into their own hands and act as prosecutor, jury, judge and executioner" in plain violation of the Constitution. *Screws* v. *United States*, 325 U.S. 91, 106 (1945). The presumption that burglary suspects have committed or will commit acts of violence arbitrarily and impermissibly sacrifices an "individualized determination" for "procedure by presumption." *Stanley* v. *Illinois*, 405 U.S. 645, 656-57 (1972); *cf. Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976). Accordingly, the Memphis deadly force policy cannot withstand the strict scrutiny mandated by the Due Process Clause.

2. Petitioner asserted below that the Memphis deadly force policy authorizes, and in this case caused, the infliction of cruel and unusual punishment in violation of the Eighth Amendment. The district court and court of appeals rejected this argument citing *Cunningham* v. *Ellington*, *supra*, 323 F. Supp. 1072, 1075, for the proposition that the use of deadly force is not punishment."

Death resulting from the use of deadly force by police officers in the circumstances of this case meets this Court's definitional tests of "punishment" within the context of the Eighth Amendment. In *Trop* v. *Dulles*, 356 U.S. 86, 96 (1958), the Court stated that "[i]f the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has

[17] Although the Eighth Circuit in *Mattis* did not decide this issue, it stated that "a good argument can be made for a decision on the basis of the Eighth Amendment." 547 F.2d at 1020 n. 32.

been considered penal." *See also Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963)."

The justification offered by Memphis police officials shows that the use of deadly force is punishment. Section 40-808 of the Tennessee Code, which was claimed to require the MPD policy (CA A. 130-38), has been recognized as a codification of the common law. *Cunningham* v. *Ellington*, *supra*, 323 F. Supp. at 1075. At common law all felonies were punishable by death. R. PERKINS, CRIMINAL LAW 10 (2d ed. 1909). The killing of a fleeing felon "was at best an extra-judicial and premature execution of a penalty which he had already incurred by his felony." Bohlen & Schulman, *Arrest With and Without a Warrant*, 75 U. PA. L. REV. 485, 495 (1927). High police officials testified at trial that to their belief the MPD deadly force policy, like the death penalty, was designed and serves as a deterrent (CA A. 92, 104, 106-07, 137-38). Underlying this testimony was an attitude that the police are not protecting the community if property crime suspects are permitted to escape without feeling the sanction of the law. The very distinction between felons and misdemeanants suggests punishment in that a misdemeanant's conduct is not deemed so serious as to warrant shooting. The penal nature of the deadly force rule was underscored by Professor Mikell at the 1930

[18] In *Mendoza-Martinez* the Court set out several factors for testing the punitive nature of government action:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. [Citations omitted.]

372 U.S. at 168-69.

ALI proceedings when he posed the rhetorical question "May I ask what we are killing him for . . .?" 9 ALI PROCEEDINGS, 187 (1930). Of course, it cannot be for either the burglary or the escape for neither is punishable by death. And yet petitioner's son was shot at with the intent to kill because he committed a statutory burglary and was fleeing.

This Court recently considered the Cruel and Unusual Punishments Clause in *Ingraham* v. *Wright*, —— U.S. ——, 45 U.S.L.W. 4364 (April 19, 1977), where it held that the Eighth Amendment does not apply to school paddlings. The Court refused to extend protection of the Eighth Amendment to situations outside the criminal process. *Id.* at 4367.[19] Petitioner does not read *Ingraham* as barring an Eighth Amendment challenge to the deadly force policy. The distinction between pre- and post-conviction stages within the criminal process was not at issue in *Ingraham*. Unlike the schoolchild, a property crime suspect has need for Eighth Amendment protection in an atmosphere such as that created by the MPD deadly force policy where a burglary suspect is declared an outlaw and shot if he runs. Also unlike the schoolchild, Fred Berry had no recourse in the restraints of common law or post-punishment vindication by a civil suit.[20]

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[19] The Court cited with approval the statement in *Powell* v. *Texas*, 392 U.S. 514, 531-32 (1968) that the Eighth Amendment has always been "directed at the method or kind of punishment imposed for the violation of criminal statutes." Mr. Justice Frankfurter states the focus of Eighth Amendment protection somewhat more broadly in his dissent to *Trop* v. *Dulles*, 356 U.S. 86, 125 (1958), by defining punishment as that government conduct which has a purpose of accomplishment of a goal within the field "technically described as criminal justice."

[20] Lower federal courts have not hesitated to accord Eighth Amendment protection to pretrial treatment of detainees or pretrial conditions of confinement. *See, e.g., Cox* v. *Turley*, 506 F.2d 1347, 1352 (6th Cir. 1974); *Howell* v. *Cataldi*, 464 F.2d 272 (3d Cir. 1972); *Wilson* v. *Beame*, 380 F. Supp. 1232, 1243 (E.D.N.Y. 1974); *Rhem* v. *McGrath*, 326 F. Supp. 681, 690 (S.D.N.Y. 1971). In fact, it would appear to serve no purpose to say that persons incarcerated on suspicion of crime have no Eighth Amendment rights, whereas those incarcerated after conviction of a crime have full protection.

There is little question that shooting a burglary suspect is "cruel and unusual" if it is punishment. Factors found relevant to this consideration by a majority of the Court in *Furman* v. *Georgia*, 408 U.S. 238 (1972), include the danger of arbitrary application, the severity of the penalty which was seen as so extreme as to be degrading to man's dignity, and the excessiveness of the penalty in the sense that it was disproportionately harsh in relation to the crime committed. *See also Gregg* v. *Georgia*, 428 U.S. 153, 172-73 (1976). These factors are present here.

Death in the streets imposed by the MPD deadly force policy is as arbitrary as the court-imposed death in *Furman*. The use of deadly force is wholly within the discretion of the individual policeman and the effect of its use is freakishly random.[21] At the time of Fred Berry's death, deadly force was used in conjunction with any felony and without distinguishing between adult and juvenile suspects. The policy completely failed to consider "the circumstances of the particular offense," *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976), or to measure "the particularized nature of the crime and the particularized characteristics of the individual defendant." *Gregg* v. *Georgia*, *supra*, 428 U.S. at 206. Moreover, there is no acceptable explanation for the disproportionate number of instances when deadly force was used against

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[21] Documents produced at trial by respondents show that of 114 occasions on which deadly force was used against fleeing property crime suspects from 1969-1974, the suspect was killed or wounded on 33 occasions (Appendix A to petitioner's brief in the court of appeals).

Negro suspects.[22] Death in a ditch inflicted by a shotgun blast is at least as severe and degrading as a post-trial execution. Finally, the killing of Fred Berry for fleeing the scene of a burglary is so grossly disproportionate to the offense committed as to violate "evolving standards of decency." *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958).[23]

3. The district court rejected as "meritless" petitioner's Fourth Amendment claim because "[n]o federal case cited by plaintiff has construed this amendment to apply to this type of situation" (A. 36a); the Sixth Circuit did not speak to the issue. It is not disputed that the MPD officers had a right to arrest Fred Berry. However, if an arrest is a seizure within the context of the Fourth Amendment, then the manner of arrest is circumscribed by the standard of reasonableness.

Every form of physical apprehension of a suspect is a "seizure" within the meaning of the Fourth Amendment. *See, e.g., Cupp* v. *Murphy*, 412 U.S. 291, 294 (1973); *Davis* v. *Mississippi*, 394 U.S. 721, 726-27 (1969); *Sibron* v. *New York*, 392 U.S. 40, 67 (1968);

[22] Although approximately 7 of 10 persons arrested for property crimes in Memphis were Negroes, 7 of 8 suspects fired upon were Negroes (A. 34a).

[23] Chief Justice Burger underscored the danger of uniform treatment of different offenses in a recent dissenting opinion:

> Freeing either a tiger or a mouse in a schoolroom is an illegal act, but no rational person would suggest that these two acts should be punished in the same way. From time to time judges have occasion to pass on regulations governing police procedures. I wonder what would be the judicial response to a police order authorizing "shoot to kill" with respect to every fugitive. It is easy to predict our collective wrath and outrage. We, in common with all rational minds, would say that the police response must relate to the gravity and need; that a "shoot" order might conceivably be tolerable to prevent the escape of a convicted killer but surely not for a car thief, a pickpocket or a shoplifter.

Bivens v. *Six Unknown Named Agents*, 403 U.S. 388, 419 (1971).

Terry v. *Ohio*, 392 U.S. 1, 16-20 (1968). Since "[t]he Fourth Amendment applies to all seizures of the person," it therefore "requires that the seizure be 'reasonable'." *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878 (1975). The manner as well as the seizure itself must be judged against the standard of reasonableness. *Terry* v. *Ohio*, *supra*, 392 U.S. at 28-29; *Schmerber* v. *California*, 384 U.S. 757, 768 (1966); *Ker* v. *California*, 374 U.S. 23, 38 (1963).[24] The question is, therefore, whether it is reasonable to shoot and kill a property crime suspect to effect his arrest, not whether it was reasonably necessary to shoot Fred Berry on the assumption that he had to be stopped at any cost.

4. The court below rejected petitioner's racial discrimination claims (based upon the Equal Protection Clause and 42 U.S.C. § 1981) by quoting the district court's finding that there was no racial motivation in the application of the Memphis deadly force policy (A. 14a). Petitioner presented below considerable statistical evidence and expert testimony showing that the deadly force policy has been implemented disproportionately against Negro suspects.[25] And during the period covered by these

[24] For example, the taking of blood in *Schmerber* was reasonable because the means and procedures employed met Fourth Amendment standards. Yet, it can scarcely be questioned that if the taking of blood were under conditions which jeopardized life, it would be unreasonable to do so.

[25] The district court refused to admit any statistical data on police shootings after January 8, 1972 (CA A. 159-60), although petitioner had made a statistical analysis of police shootings and arrest statistics for a 1969-74 period. A larger sample pre-dating 1969 was impossible because of the claimed inability of the MPD to produce information for periods prior to 1969. The 1969-71 data show that 46 of the 53 property crime suspects shot at but not killed were Negro, whereas 10,619 Negroes and 3,847 whites were arrested for property crimes during the same period (CA A. 331, 456). Petitioner's expert witness testified that the racial difference between those arrested for property crimes and those shot at was statistically significant at the .02 level (less than 2 chances in 100

statistics there was pervasive racial discrimination in Memphis law enforcement.[26] The evidence constituted a prima facie showing that race was a factor in Fred Berry's death, but the district court rejected this evidence as unpersuasive. There was even a tacit recognition that there had been no explanation for the disparity. However, rather than shift the burden of proof, the court inappropriately supplied by conjecture what the respondents failed to prove.[27]

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that the difference occurred by chance) (CA A. 200-01). (The larger sample (1969-1974) produced a racial difference statistically significant at the .001 level—less than 1 chance in 10,000 that the difference was due to chance) (CA A. 169-71, 458).

[26] The MPD's racially discriminatory employment and law enforcement practices are well documented in a series of community studies and reports (CA A. 350-59, 379-89), and in the 1974 consent decree entered in the employment discrimination lawsuit brought by the Department of Justice against the City. *United States* v. *City of Memphis*, C.A. No. C-74-286 (W.D. Tenn.). For example, although the Negro population of Memphis in 1974 was 39 percent, only 10 percent of the police officers were Negro and 3.1 percent were in the officer ranks (CA A. 383). There was testimony at trial concerning police mistreatment of Negroes from the civil rights demonstrations in the early 1960's through the 1968 death of Martin Luther King, Jr., the 1969 Negro boycott of public schools, and the October 1971 beating death of a Negro juvenile by Memphis police (CA A. 149-50, 150-54, 180-85, 188, 194-97). The poor relations between police and the Negro community were generally acknowledged by respondents (CA A. 516-18, 528-32).

[27] The district court speculated as follows:

> Of course, the court cannot know what proportion of blacks or whites sought to be arrested while in the act of burglary or robbery attempted to flee or to avoid arrest by Memphis police officers. If, as plaintiff also argues, more Memphis blacks are disposed to flee, especially young blacks, because of fear and/or mistrust of police, then it would logically follow that a higher proportion of blacks would be involved in the necessary use of force by police to prevent escape or to effect apprehension. This, if true, would not amount to discriminatory application of a lawful policy by police, if they reasonably and properly (and lawfully) also first sought to utilize every other legitimate means of effecting arrest before the last alternative of using a firearm. [A. 35a.]

Although official acts are not rendered unconstitutional solely on the basis of disproportionate racial impact, *Washington* v. *Davis*, 426 U.S. 229, 239 (1976), "[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face." *Arlington Heights* v. *Metropolitan Housing Corp.*, —— U.S. ——, 45 U.S.L.W. 4073, 4077 (January 11, 1977). As in this case, the race of a fleeing suspect is generally recognizable. The administration of the deadly force policy is left to the unregulated discretion of individual MPD officers—a procedure that is open to the play of subjective racial prejudice and is inherently susceptible to abuse. Under such circumstances, a statistically significant racial disparity makes out a prima facie case of discrimination and the burden shifts to the state to rebut the case. *Castaneda* v. *Partida*, —— U.S. ——, 45 U.S.L.W. 4302, 4305 (March 23, 1977). The error of law, affirmed by the Sixth Circuit, is the failure, in the face of an unanswered presentation of racial discrimination, to shift the burden of explanation to the City of Memphis. *See Castaneda* v. *Partida*, *supra*; *Keyes* v. *School Dist. No. 1*, 413 U.S. 189 (1973); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Turner* v. *Fouche*, 396 U.S. 346 (1970). The court of appeals should have remanded for further proceedings in light of proper legal standards.

CONCLUSION

We respectfully request the Court, for all the reasons set forth above, to grant certiorari, reverse the decision below, and resolve the inter-circuit conflict on the important issue of the constitutionality of police deadly force policies.

Respectfully submitted,

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APPENDIX

APPENDIX A.

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 75-2321

MARTHA WILEY, mother and next of kin of
FRED LEE BERRY, a Deceased minor,
Plaintiff-Appellant,

v.

MEMPHIS POLICE DEPARTMENT, et al.,
Defendants-Appellees.

Argued Oct. 18, 1976

Decided Feb. 10, 1977

Before WEICK and McCREE, Circuit Judges, and MILLER,* Judge of the United States Court of Customs and Patent Appeals.

WEICK, Circuit Judge.

This is an appeal from a judgment for the defendants after a non-jury trial of an action seeking $1,000,000 damages and declaratory relief, brought by Martha Wiley against police officers and municipal defendants. Wiley sued for the alleged wrongful death of her son, Freddie Lee Berry, who was nearing his seventeenth birthday when he was shot and killed in the night season while fleeing from a sporting goods store in which the police officers had observed him and two companions in the commission of a burglary.

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*The Honorable Jack R. Miller, Judge of the United States Court of Customs and Patent Appeals, sitting by designation.

Jurisdiction of the Court was invoked under 28 U.S.C. §§ 1331(a), 1343(3), and 1343(4) for alleged causes of action under 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 1988, and under the Fourth, Fifth, Sixth, Eighth, Thirteenth and Fourteenth Amendment to the Constitution. Pendent jurisdiction was invoked seeking similar relief under Tennessee law.

Plaintiff challenged the deadly force policy of the City of Memphis and the Memphis Police Department (MPD), which policy authorized police officers to use deadly force whenever they deemed it necessary to effect the arrest of a felon. Plaintiff claimed that such policy was a violation of the constitutional rights of her decedent. The defense was that such policy was specifically authorized by and conformed to Tenn. Code Ann. § 40-808, which provides:

> *Resistance to Officer.*—If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest.

Jury was waived and the trial was held by the Court over a period of four days. The Court gave careful consideration to all of the issues and handed down a Memorandum Opinion consisting of twenty-two pages, in which it made findings of fact and adopted conclusions of law. The findings with respect to the burglary, the attempts of the officers to arrest the burglars, and the shooting, are appended hereto as Exhibit "A".

Briefly, the facts are that on the night of January 8, 1972, officers Calliham, Roleson, Cox and Richards responded to a radio dispatch about prowlers inside a sporting goods store in Memphis, Tennessee. Officer Calliham went to the front door of the store and saw three black males inside, in the area of a soft drink machine. Officer Calliham yelled to the males to come out; they

looked up and dispersed. Officers Cox and Richards were informed by Calliham as to what he had seen, and those officers drove to the northeast area behind the building. As they were getting out of their car they saw two black males run from the rear of the south portion of the building. It was raining but the storage lot was lighted and the officers could see the two youths who either climbed over or went under the fence into a large drainage ditch. As found by the Court, it was "dark and obscure" along the drainage ditch, and the area was cluttered with brush and debris. Officers Richards and Cox repeatedly yelled for the fleeing youths to "halt", but they paid no heed and kept on running. Both officers decided to fire at the youths. A subsequent search of the area revealed Freddie Lee Berry, plaintiff's decedent, critically wounded, lying approximately 208 feet down the ditch from the point where Cox and Richards had fired. The officers' investigation revealed also a "stash" consisting of two shotguns and ammunition taken from the sporting goods store and placed in the ditch near the spot where Berry was found. The second suspect escaped but later surrendered at police headquarters. The third youth was captured when he was found hiding in the sporting goods store.

The complaint named as defendants the Memphis Police Department (MPD), the City of Memphis, Tennessee, Bill Price, Chief of Police of Memphis, Wyeth Chandler, Mayor of Memphis, Henry Loeb, former Memphis Mayor, M. J. Calliham, R. D. Roleson, B. J. Cox, J. K. Richards, W. W. Wannamaker, and Jule Ray, all Police Officers of the City of Memphis, and John Doe and others similarly situated.

The complaint charged that MPD, the City, the Chief of Police, the Mayor and former Mayor, all were responsible for the policies, practices, customs and usages pertaining to the use of firearms by the police officers,

which policies violated the constitutional rights of plaintiff's decedent resulting in his death.

The facts as found by the District Judge, however, were that these policies, practices, customs and usages were authorized by the Legislature of Tennessee in its enactment more than one hundred years ago, of the present language of T.C.A. § 40-808, hereinabove set forth. This language appeared as Section 5040 of the Tennessee Code of 1858, the first official code of Tennessee, and embodied the common law of that State. *Love* v. *Bass*, 145 Tenn. 522, 529, 238 S.W.94 (1921); *Reneau* v. *State*, 70 Tenn. 720 (1879).

The Court made the following findings with respect to plaintiff's decedent:

> Berry, beginning at a very early age, had been the subject of frequent proceedings in the Memphis Juvenile Court, including two formal adjudications in the nature of criminal proceedings. He was found guilty of burglary at age 13 and placed on probation, but a year later he was expressly found to have committed a delinquent act and ordered as a delinquent to a state juvenile institution indefinitely. After release, he was later the subject of other charges, including school problems similar in character to those preceding commitment. [Footnotes omitted].
>
> (App. 000238)

The Court further found that the officers did not know that two of the burglars were juveniles, and that the officers acted in good faith. The Court stated:

> Both defendants Cox and Richards were familiar with the SBM Co. location; both had investigated prior burglaries there; they had driven around the building through its front parking lot onto Ferguson Street; and they had driven to the back of the

> building through the adjacent parking area to the south and behind neighboring buildings to the south. They both knew about the ditch and the direction in which it ran and the fence surrounding it. At the time there was considerable brush and bushes in the area, and debris in the ditch. It was possible for Cox and Richards to have driven along side the ditch by proceeding back on Ferguson, turning onto Bellevue and going around to the parking area to the south nearby the place the youths were running down the ditch, but it was likely they would have escaped just as Lurry actually did that very night.
>
> Under the peculiar circumstances—night darkness, rain, intervening barbed wire fences, the distance between them and the suspects and availability of cover, neither Cox nor Richards could reasonably expect to chase or otherwise catch or capture the fleeing felons. They could not be sure the suspects were not armed. The court finds that these alternatives to the use of deadly force in the circumstances of this case were not available to defendants Cox and Richards, if they were to attempt to apprehend Berry and his companion in crime.
>
> Both officers Cox and Richards testified that they shot without attempting merely to wound or incapacitate the fleeing two and that they were trained that whenever they use their firearms to "shoot to kill." At the distance involved and under these circumstances, any attempt merely to cripple or to wound would probably have been ineffectual. Defendant Lux denied that Memphis police were, in fact, instructed to shoot to kill in all fleeing suspect circumstances. It would appear that they were instructed to fire at the torso.
>
> (App. 000242-43)

The defendants, Cox and Richards, employed the only practicable means available to them under peculiarly difficult circumstances requiring split second judgment to prevent the deliberate attempt to escape of one caught in the midst of a felonious burglary. Plaintiff failed to carry the burden of proving that Cox or Richards either knew or should have known that Berry was a juvenile. These officers could not surely have known whether defendants were or were not armed, and it later developed that stolen weapons were indeed nearby and available to them. To ascribe to plaintiff's counsel's contentions under these facts would be to recognize a felon's constitutional right to escape if the only reasonable and practicable means to prevent it were to employ potentially lethal force by use of a firearm. This is indeed borne out by Lurry's successful escape under these identical circumstances. In a real sense, this court is being called upon by plaintiff to rule the allowable Tennessee law procedures, more stringently applied in Memphis by the MPD, to be declared unconstitutional in the face of a three judge court's contrary determination less than a year before this episode. This court agrees with the opinion there expressed, 323 F.Supp. 1075, that "this is a policy decision for the Tennessee Legislature or perhaps the Tennessee courts and not for federal courts in the guise of constitutional adjudication. Compare the concurring opinion of Judge McCree in *Beech* v. *Melancon*, supra. In any event, Cox cannot be held liable because his actions cause no harm or damage to plaintiff. Berry died shortly after he was shot without gaining consciousness. Nor can the court hold the other defendants liable under the circumstances for constitutional or illegal deprivation of plaintiff's rights. [Footnote omitted.]

(App. 000252-53)

The constitutionality of T.C.A. § 40-808 had already been upheld in this Circuit by a three-judge District Court consisting of Circuit Judge Harry Phillips and District Judges Bailey Brown and Robert M. McRae, Jr., in *Cunningham* v. *Ellington*, 323 F.Supp. 1072 (W.D. Tenn. 1971). In that case the statute was attacked in a case similar to the present one, involving the Memphis police, where the decedent was shot and killed by police officers who were investigating a burglary attempt and while he was fleeing from arrest by the officers. It was claimed that the statute was unconstitutional on its face because it permitted the use of cruel and unusual punishment in violation of the Eighth Amendment; that it was unconstitutionally overbroad; that it was unconstitutional incursion with respect to a person's right to a trial by jury, confrontation of witnesses, assistance of counsel, etc.; and that the statute violated the due process clause of the Fourteenth Amendment.

The Court stated at 1074-75:

> It is agreed by all parties that, as construed by the Tennessee courts, this statute means, in the present context, that an officer may use force that may result in death in preventing the escape of a person that he is attempting to arrest if (1) he reasonably believes that the person has committed a felony and (2) he notifies the person that he intends to arrest him and (3) he reasonably believes that no means less than such force will prevent the escape. The parties also agree that, so construed, the statute merely states the common law. *Reneau* v. *State*, 70 Tenn. 720 (1879); *Love* v. *Bass*, 145 Tenn. 522, 238 S.W. 94 (1921); *Scarbrough* v. *State*, 168 Tenn. 106, 76 S.W.2d 106 (1934); *Johnson* v. *State*, 173 Tenn. 134, 114 S.W.2d 819 (1938).

With respect to the Eighth Amendment the Court stated at 1075, ". . . we simply are not dealing with pun-

ishment." The Court further held that the statute was not unconstitutionally vague and that it did not violate the Fourteenth Amendment.

We considered the constitutionality of T.C.A. § 40-808 in another case, *Beech* v. *Melancon*, 465 F.2d 425 (6th Cir. 1972), *cert. denied*, 409 U.S. 1114, 93 S.Ct. 927, 34 L.Ed.2d 696 (1973), wherein two robbers were shot and one of them killed by Memphis police when they were attempting to rob a gas station and to escape from the scene of the felonious activity. They had been informed that the defendants were police officers and had been warned to halt but they did not do so. In that case the single issue was whether the trial judge was clearly in error in concluding that the defendants were justified in the use of deadly force in order to apprehend the culprits.

In finding that the District Judge had evidence to justify his finding that the "officers used only the necessary means to effect the arrest," this Court, with Judge McCree concurring in the result, followed *Cunningham* v. *Ellington, supra,* in unholding the constitutionality of the statute.

However, what is more important is the fact that the Court stated at page 426:

> In any event the police officers were entitled to assume the constitutionality of the Tennessee Statute. "State statutes like federal ones are entitled to the presumption of constitutionality until their invalidity is judicially declared." *Davies Warehouse Company* v. *Bowles*, 321 U.S. 144, 153, 64 S.Ct. 474, 479, 88 L.Ed. 635 (1944), and see also *McDonald* v. *Board of Election*, 394 U.S. 802, 808, 809, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969); *Davis* v. *Department of Labor*, 317 U.S. 249, 257, 63 S.Ct. 225, 87 L.Ed. 246 (1942).

In the present case, at the time the officers were pursuing the burglars in the dark of a rainy night, there was

considerable brush and bushes in the area, and debris in the ditch, and the officers did not have the opportunity or the time to ascertain whether the statute which authorized them to use all means necessary to effect the arrest was constitutional. They had a right to assume that the statute was constitutional. It had been twice so declared in this Circuit, first by the three-Judge Court, and later by this Court, and its invalidity, or that of a similar statute, up to that time had never been declared by any Court. The plaintiff has not cited a single case to the contrary decided prior to the burglary involved in the present case.

The officers knew that the sporting goods store sold weapons. They were not required to assume that the burglars were unarmed and would not shoot at them. As a matter of fact, the "stash" of stolen arms and ammunition was found near the body of Berry where he had fallen. Although two of the burglars, unknown to the officers, were juveniles, they were undoubtedly able not only to commit the burglary, but also to pull the trigger of a gun and shoot and kill the officers.

In *Terry* v. *Ohio*, 392 U.S. 1, 23, 88 S.Ct. 1868, 1881, 20 L.Ed.2d 889 (1968), the Supreme Court said:

> We are now concerned with more than the governmental interest in investigating crime, in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded.

See also *Wolfer* v. *Thaler*, 525 F.2d 977 (5th Cir. 1976), *cert. denied*, 425 U.S. 975, 96 S.Ct. 2176, 48 L.Ed.

2d 800 (1976); *Jones* v. *Marshall*, 528 F.2d 132 (2d Cir. 1975); *Hilton* v. *State*, 348 A.2d 242 (Me.1975); *Schumann* v. *McGinn*, 240 N.W.2d 525 (Minn. 1976).

The decision of the three-Judge District Court in Cunn*ingham* v. *Ellington, supra*, was followed in *Mattis* v. *Schnarr*, 404 F.Supp. 643 (E.D.Mo. 1975), where the Court, in considering a statute virtually identical with the Tennessee statute, stated at 651:

> Again the Court notes that any classification which would allow deadly force to be used against persons who have committed certain specified crimes, and not against other offenders would inevitably be subject to the same attack as plaintiff wages here. To abolish the use of deadly force altogether is to deprive the state and its citizens of their rights to security, safety and a feeling of protection. To pick and choose those crimes warranting the application of these statues is the duty of the legislature. It involves a determination of the effect and seriousness of crimes on society and such a determination lies exclusively within the province of the legislative branch. It is not the role of a federal judge to legislate for the people of a state.

The Court, in its opinion, cited similar statutes of thirty-four states authorizing the use of such force, which use of force is sought to be held unconstitutional here. These statutes merely embodied the common law which has been in force for centuries and has been universally recognized.

Upon appeal to the Eighth Circuit, in Appeal No. 75-1849, heard en banc, the Court in a four-to-three decision, reversed the District Court on December 1, 1976. The majority opinion rejected our decision in *Beech* v. *Melancon, supra;* the decision of the District Court in the present case; the decision of the three-Judge District Court in

Cunningham v. *Ellington, supra;* the Second Circuit decision in *Jones* v. *Marshall, supra;* and the Fifth Circuit decision in *Wolfer* v. *Thaler, supra.* It even erroneously stated 528 F.2d 141, n. 21 that the Court in *Wolfer* v. *Thaler* had held that the parents did not have standing to sue despite the statement in *Wolfer* (at 978, n. 1) that the parents did have standing.

The Eighth Circuit is the only Court to our knowledge which has ever held that such a statute, which is so necessary even to elementary law enforcement, is unconstitutional. It extends to the felon unwarranted protection, at the expense of the unprotected public.

We agree with the dissent in the Eighth Circuit case (*Mattis* v. *Schnarr*), which was highly critical of the majority opinion for not following the decisions of other Circuits and for embarking on a new course which should have been left to the state legislatures where it belongs.

The legislative bodies have a clear state interest in enacting laws to protect their own citizens against felons, and a right, if not a duty, to do so. When the burglar escapes pursuit he is free to commit other felonies. The dissent appropriately pointed out:

> In 1934 the ALI, in its First Restatement of Torts, modified the common law principle permitting the use of deadly force to effect the arrest of a felon. *Restatement (First) of Torts* § 131 (1934). This modification was abandoned in 1948, however, and the common law rule was readopted. The 1966 Appendix to the Second Restatement of Torts justifies this abandonment on the grounds that the modification contained in § 131 had, from its inception, lacked any support other than dicta and argument by analogy.

The dissent further states:

> There is no constitutional right to commit felonious offenses and to escape the consequences of those

offenses. There is no constitutional right to flee from officers lawfully exercising their authority in apprehending fleeing felons.

The majority opinion of the Eighth Circuit in *Mattis* does not suggest how law enforcement officers are to make the on-the-spot constitutional analysis called for by its proposal and still react quickly enough to meet the exigencies of an emergency situation. How can a police officer ever know, reasonably or otherwise, whether the felon will use force against others if he is not immediately apprehended? It is clearly the prerogative of the state legislature to decide whether such restrictions on the use of force are consonant with public policy.

The facts in this case are significantly different from the facts in *Mattis* v. *Schnarr*, *supra*. That case involved the burglary of the office of a golf driving range, while this case involved the burglary of a sporting goods store where weapons and ammunition were sold. The officers in the present case could have assumed, reasonably, that the two young males might be armed and reasonably could have feared for their lives. Further, the "stash" of shotguns and ammunition found in the ditch near where the decedent was found, reinforces the fact that the officers might have been shot had they not reacted quickly to the emergency.

It should always be remembered that both officers were shooting in the dark, 208 feet away from the youths, and that the youths were fast escaping. The bullet fired by by the pistol of Officer Cox only grazed Berry, and Officer Richards was able to hit Berry, using a shotgun by which only one of the pellets struck and killed him.

Under Tennessee law the determination of whether or not there was a reasonable necessity for the killing, and the reasonableness of the grounds upon which the officer acted in shooting, are questions for the jury. *Love* v. *Bass*, 145 Tenn. 522, 529, 238 S.W. 94 (1921). The District Judge determined these factual issues against the plaintiff.

In *Qualls* v. *Parrish*, 534 F.2d 690 (6th Cir. 1976), this Court, in an opinion written by Judge McCree, cited *Love* v. *Bass*, *supra*, with approval and held that the law of the state should be considered in determining the federal law to be fashioned to determine the liability of the officers. There the Court stated at 694:

> Our principal reason for agreeing with the district court that the Tennessee rule should be made the federal rule in this case is that a decision to the contrary would be unfair to an officer who relied, in good faith, upon the settled law of his state that relieved him from liability for the particular acts performed in his official capacity. Most of the state courts that have considered this question follow the old common law rule that deadly force may be used by a police officer only when he has reasonable grounds to believe that the person he is attempting to arrest has committed a felony.

There can be no question but that the officers in the present case had such reasonable grounds because they actually saw the burglars in the store as they were burglarizing the store. The officers pursued the burglars as they were fleeing from the sceen of their crime. Since the burglars were still being hotly pursued they are regarded as being engaged in the commission of the burglary at the time of their pursuit. *United States* v. *Jarboe*, 513 F.2d 33 (8th Cir. 1975); *United States* v. *Von Roeder*, 435 F.2d 1004 (10th Cir. 1971).

We are of the opinion that there was substantial evidence to support the factual findings of the District Court and they are not clearly erroneous. The Court's conclusions of law are correct.

We are of the opinion further that MPD, the City, the Mayor, and the former Mayor, and the Chief of Police

had the same right to rely on the law of Tennessee and the decisions of this Court and the decision of the three-Judge Court in formulating their policies. Also, they could rely on the presumption that the Tennessee statute was constitutional and on the fact that no court at that time had ever held that statute or a similar statute to be unconstitutional.

The District Court did not exercise pendent jurisdiction although it stated that plaintiff's state court claims would fail under the decision which it reached. Plaintiff did not appeal from the Court's refusal to exercise pendent jurisdiction, and therefore that issue is not before us. Likewise, the Court declined to find subject matter jurisdiction of plaintiff's constitutional claims against the city, under 28 U.S.C. § 1331(a). We note here that this ruling was erroneous. Municipalities may be sued directly for Fourteenth Amendment violations through 28 U.S.C. § 1331(a). *Amen* v. *Dearborn*, 532 F.2d 554 (6th Cir. 1976). The Court did, however, assume subject matter jurisdiction over the other defendants and did consider and decide the constitutional issue as well as the other issues in the case.

The District Court held with respect to plaintiff's claim of racial discrimination that "plaintiff has failed to persuade the court that under the circumstances of this case defendants have discriminated against her or against her son because of their race."

Nor did the Court find a denial of equal protection when it said:

> No racial animus or basis is shown to motivate the policy involved. Both white and black fleeing felons have been shown by plaintiff's own proof to have been fired upon or shot by Memphis police as a matter of last resort where otherwise arrest cannot be reasonably accomplished and escape is inevitable, even in the case of so-called property crimes.

In our opinion these findings of fact are supported by substantial evidence and are not clearly erroneous.

As to racial impact, the Supreme Court in *Washington* v. *Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 2047, 48 L.Ed. 2d 597 (1976) stated:

> . . . [O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.

The judgment of the District Court is affirmed.

[An appendix reciting an excerpt from the District Court opinion is deleted.]

McCREE, Circuit Judge (Concurring).

I concur in the result because I do not regard this appeal as requiring us to decide whether the rule that permits a police officer to use deadly force to apprehend a fleeing felon when there is no threat to human life is constitutional. On several occasions, we have approved a rule that permitted the use of deadly force by police officers to apprehend a suspected felon when the felon appeared to present a threat to human life. Appellants urge that these decisions do not control this case because there was no such threat here. The district court, however, relied both on the fact that the officers could not have known whether the fleeing persons were armed and on the fact that no other means existed by which they could have been apprehended. There is sufficient evidence in the record to support the conclusion that the fleeing felons in this case did present an apparent threat to human life, and therefore I join in the decision of the court.

Although I agree that reliance on the law by a state officer may exonerate him from personal liability in damages, I do not regard reliance by the officer as precluding declaratory relief if action in reliance on an existing rule violated the constitutional rights of the decedent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. C-73-8

[Filed Jun. 30, 1975]

MARTHA WILEY, etc.,
Plaintiff,

vs.

MEMPHIS POLICE DEPARTMENT, et al.,
Defendants.

MEMORANDUM OPINION

Plaintiff Martha Wiley, mother and next of kin of Freddie Lee Berry, a black youth shot and killed by Memphis police officers on January 8, 1972, initiated this action against the Memphis Police Department, an executive department of the City of Memphis, Tennessee, hereafter MPD; the City of Memphis, a municipal corporation organized and existing by virtue of the laws of the State of Tennessee, hereafter "City;" Chief of Police Bill Price (since retired); former Chief of Police Henry Lux; Wyeth Chandler, Mayor of Memphis; Henry Leob, a former Mayor of Memphis; M. J. Calliham, R. D. Roleson, B. G. Cox, and J. K. Richards, police officers of the City of Memphis and the Memphis Police Department; W. W. Wannamaker and Jewell G. Ray, supervisory officials of the Memphis Police Department; and "John Doe and others similarly situated."

Plaintiff invoked the court's jurisdiction under 28 U.S.C. §§ 1331(a), 1343(3), and 1343(4) for alleged

causes of action arising under 42 U.S.C. §§ 1981, 1983, 1985, 1986 and 1988, and the Fourth, Fifth, Sixth, Eighth, Thirteenth and Fourteenth Amendments to the United States Constitution. Plaintiff asserted the value in controversy to be in excess of $10,000.00. She prayed both for declaratory relief and for money damages (punitive and compensatory) as a result of the alleged wrongful death of her son, as well as for claimed incidental losses.

Plaintiff also invoked the court's pendent jurisdiction seeking similar relief for alleged causes of action arising under Tennessee law.

All defendants filed a joint motion to dismiss. By order entered April 11, 1973, by Chief Judge Bailey Brown (to whom this case was initially assigned), the motion to dismiss was granted as to defendants MPD and the City. As to all other defendants, the motion to dismiss was denied.

By consent order entered April 25, 1974, defendants Roleson and Calliham were voluntarily dismissed as defendants, with prejudice.

By order entered October 7, 1974, the court vacated in part its order of April 11, 1973, and reinstated the City and MPD as defendants for adjudication of plaintiff's claims under 42 U.S.C. §§ 1981 and 1988 only. The court declined at that time "to accept plaintiff's invitation to assume independent jurisdiction under 28 U.S.C. § 1331 in this cause since plaintiff's civil rights claim against these defendants [City and MPD] is recognized under the 1866 [Civil Rights] Act." The court also denied the motions of the remaining parties defendants for summary judgment, denied plaintiff's motion for partial summary judgment, and denied plaintiff's motion to strike the demand for jury trial.

By consent order entered January 27, 1975, defendants Wannamaker, Ray and Loeb were voluntarily dismissed as parties defendant, leaving the City and MPD as entity defendants, and Richards, Cox, Chandler, Price and Lux as individual defendants, all of whom are white.

By consent order entered January 29, 1975, defendants waived their demand for trial by jury and the parties agreed to try the case to the Court sitting without a jury. Trial was held on all of plaintiff's allegations and related issues, including wrongful death in violation of federal statutory and constitutional law, as well as Tennessee law, for which all or some of defendants are claimed liable, and the wrongful death pursuant to deadly force and firearms training policies and practices of the City which are alleged to be in violation of the Constitution and laws of the United States and of the State of Tennessee.

Plaintiff's son, Freddie Lee Berry, was almost 17 years of age but was only in the seventh grade at the time of his death. He was not a large youth (5′ 4″ tall and weighed 118 pounds),[1] and he was the youngest of plaintiff's three children.

Berry, beginning at a very early age, had been the subject of frequent proceedings in the Memphis Juvenile Court, including two formal adjudications in the nature of criminal proceedings. He was found guilty of burglary at age 13[2] and placed on probation, but a year later he was expressly found to have committed a delinquent act and ordered as a delinquent to a state juvenile in-

[1] His mother testified that she thought he weighed about 130 or 140 pounds.

[2] His first involvement with juvenile authorities was at age 10 or 11.

stitution indefinitely. After release,[3] he was later the subject of other charges, including school problems similar in character to those preceding commitment. Berry received minor's benefits after his father's death in 1968 and was never employed to assist his working mother, though his school accomplishments were evidently minimal with a persistent truancy problem noted. He was warned about use of profane and threatening language and concerning assault and battery charges pertaining to his schooling. His mother, however, recalled little about the details of these episodes and denied knowledge of some of them. Berry's record indicates a rather typical juvenile delinquency pattern with incarceration found necessary because of his aggressive and/or criminal tendencies.

On the night of January 8, 1972, shortly after 8:00 P.M., the police radio dispatcher for the MPD's South Precinct put out a call: "Bellevue and Ferguson at sporting goods,[4] prowlers inside." Officers Calliham and Roleson in a police patrol car responded to the call and were the first to arrive on the scene, although defendants Cox and Richards also arrived on the scene in a patrol car almost simultaneously. SBM Co. is located at the southeast corner of South Bellevue (a street which runs in a north-south direction, a major thoroughfare, and Ferguson (an east-west street). It has a storage yard in the back (to the east) and to the northeast of the building which fronts on South Bellevue, facing west, with the main entrance being in the northwest corner of the building. The storage yard is bordered by a chain-link cyclone fence which is about 6 feet high with three strands of barbed wire on top. The fence separates the

[3] He had been released a little more than a year before his death.

[4] South Bellevue Marine Company was the location, a sporting goods store specializing in boats, boat motors, and other marine equipment. It is referred to hereinafter as SBM Co.

storage yard from a large drainage ditch which runs north and south at the back of the SBM Co. property, and which runs through a culvert under Ferguson Street. There is also a similar east-west chain-link fence separating Ferguson Street from the ditch at the point where the street crosses the ditch, and a north-south chain-link fence also separates the drainage ditch on the eastern bank from the home of one Don Krag. These fences prevent access to SBM Co. or the ditch from Ferguson. From the point where it intersects with Ferguson Street, the drainage ditch runs due south for several hundred feet before curving to the west where it intersects with South Bellevue. To the east of the southern portion of the ditch, south of the Krag home, is a large housing project inhabited primarily by black families. There is a large paved area to the south of SBM Co. property along the ditch in question. This parking area is also separated from the drainage ditch by a chain-link fence, but this fence is not as high as the one surrounding SBM Co.

When officers Calliham and Roleson arrived on the scene, they stopped their patrol car directly in front of SBM Co. which has a large glass front. Officer Calliham went to the front door and officer Roleson began running south in front of the building for the purpose of circling around behind the building at the point where the parking area adjoins the storage yard to the south. The inside of the SBM Co. was well lighted and Calliham could see three male blacks inside in the area of a soft drink machine. Richards and Cox who had also just arrived were so informed. Cox and Richards proceeded in the patrol car north and turned east on Ferguson Street along the north side of SBM Co. They stopped their car near the point where Ferguson crosses the drainage ditch. As Cox and Richards were getting out of their car, they saw two male blacks running out of the rear of the south portion of the building near the fence

which separates the storage yard from the adjacent parking lot. It is approximately 54 feet from the back of the building along this east-west fence to the north-south fence along the drainage ditch. It was raining but the storage lot was lighted and the officers could see the two, who kept running and either climbed over or went under the north-south fence into the drainage ditch which was dark and obscure. Richards and/or Cox yelled for them to "halt" repeatedly as they ran from their patrol car to the fence which separates the ditch from Ferguson Street. The two fleeing males paid no heed to the commands to stop, but instead continued running into and down the drainage ditch away from the officers.

At this time Cox and Richards both decided to fire at the two fleeing suspects, concluding they could not apprehend them otherwise. Cox fired twice with his .38 caliber police special pistol and Richards fired three times with a shotgun loaded with buckshot. The firing was almost simultaneous.[5] Richards did not exhaust his available shots. Defendant Richards saw one of the suspects appear to stumble upon his second or third shot. An ambulance was immediately called and a search of the ditch revealed Freddie Lee Berry lying face down a distance of some 208 feet down the ditch from where Cox and Richards had fired, and roughly 20 feet from where the youths had gone into the drainage ditch. Subsequent investigation by these officers after firing also revealed a "stash" consisting of two shotguns and ammunition apparently taken from SBM Co. and placed in the ditch nearby where Berry was found. It is reasonable to assume Berry and his companion had not only broken in SBM Co. but had burglarized it, and were in the process of continuing the felony when interrupted. Berry had been wounded in the back of the head with

[5] Neighboring property owner Don Krag stated that it sounded to him as if only one gun was being fired.

a shotgun pellet and had also received a chin "graze" from another gunshot. He was alive but unconscious at the time he was found and was taken to the hospital where he died shortly thereafter.

The other black male fleeing with Berry was Thomas B. Lurry, age 17, who escaped. He later turned himself in at police headquarters and was adjudicated as a delinquent juvenile.[6]

Both defendants Cox and Richards were familiar with the SBM Co. location; both had investigated prior burglaries there; they had driven around the building through its front parking lot onto Ferguson Street; and they had driven to the back of the building through the adjacent parking area to the south and behind neighboring buildings to the south. They both knew about the ditch and the direction in which it ran and the fence surrounding it. At the time there was considerable brush and bushes in the area, and debris in the ditch. It was possible for Cox and Richards to have driven along side the ditch by proceeding back on Ferguson, turning onto Bellevue and going around to the parking area to the south nearby the place the youths were running down the ditch, but it was likely they would have escaped just as Lurry actually did that very night.

Under the peculiar circumstances—night darkness, rain, intervening barbed wire fences, the distance between them and the suspects and availability of cover, neither Cox nor Richards could reasonably expect to chase or otherwise catch or capture the fleeing felons.

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[6] The third person inside the SBM Co. premises on the night in question was Jerry Lewis Lipford, a black youth 18 years of age. He did not flee the premises, but rather hid inside the building. He was arrested inside the building after being found pursuant to a building search by a police dog. The record does not disclose the disposition of burglary charges that were placed against Lipford.

They could not be sure the suspects were not armed. The court finds that these alternatives to the use of deadly force in the circumstances of this case were not available to defendants Cox and Richards, if they were to attempt to apprehend Berry and his companion in crime.

Both officers Cox and Richards testified that they shot without attempting merely to wound or incapacitate the fleeing two, and that they were trained that whenever they use their firearms to "shoot to kill." At the distance involved and under these circumstances, any attempt merely to cripple or to wound would probably have been ineffectual. Defendant Lux denied that Memphis police were, in fact, instructed to shoot to kill in all fleeing suspect circumstances. It would appear that they were instructed to fire at the torso. Cox and Richards were on duty and were acting in their capacity as police officers of the City when they fired at Berry. Richards actually fired the deadly shot. With respect to shooting, police training does not distinguish particularly between the shotgun and the pistol. Although the shotgun has a recommended effective range of 40 yards, it fires a pattern of pellets which is approximately three feet in diameter.

Berry's personal effects were confiscated, although plaintiff requested their return shortly after this tragic episode. They were of minimal value.

Defendant Richards joined the MPD in 1968, and took a 7-week course at the Police Training Academy. On two other occasions defendant Richards has used deadly force against persons, once in another incident involving a fleeing burglary suspect prior to this date and later acting in self defense.

Richards stated that he was trained to use deadly force as a last resort only to arrest fleeing felons. He did not understand MPD to differentiate between types of felonies in authorizing deadly force as a last resort.

Defendant Cox joined the MPD in 1964, and received 12 weeks of training at the Police Academy. At some time prior to 1972, defendant Cox fired his pistol at a fleeing stolen car occupied by a black male, but no one was injured.[1] Cox, like Richards, was trained to use deadly force as a last resort to arrest all fleeing felons. Since Cox did not fire the deadly shot or shots, his acts even if improper, were not the direct and proximate cause of any damages to plaintiff.

On January 8, 1972, Memphis police officers were operating pursuant to deadly force policies and procedures maintained and implemented by the police administration of former Director of Fire and Police Holloman and former Chief of Police Lux. Holloman resigned his position (having been appoined by former Mayor Henry Loeb) in 1970, and former Chief Lux, a defendant in this cause, is presently a member of the faculty at Memphis State University teaching law enforcement courses. Lux joined MPD as a patrolman in 1945 and became Chief of Police in 1968. He retired as Chief on November 1, 1971, before this incident, but there were no significant changes in the policy regarding the use of deadly force after Lux retired and until the time of Berry's death.

At the time in question in this suit (January 8, 1972), there appear to have been few formal expressions of the policy of MPD as to the use of deadly force. In a "Manual of Rules and Regulations," prepared in large part by Chief Lux when he was an Assistant Chief in 1961, it is cryptically specified: "No member of the Department shall intentionally fire any weapon except as authorized by law." This manual was the only document containing rules and regulations which was issued to each individual patrolman over the next ten years, including Cox and Richards.

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[1] It is possible that in 1969 he fired his weapon at a fleeing burglary suspect who refused to halt when ordered to do so.

Also in use during the period in question was a larger and more detailed policy and procedure manual which was maintained at the administrative level of MPD, but was not issued to patrolmen. This document, as corrected on March 7, 1967, states as follows:

> "When resistance to arrest occurs: The vast majority of persons will submit to an arrest, however, some will not. Against those that resist, the law gives an officer the power, and he is equipped with the devices to effect the arrest and restrain them.
>
> The law, however, does not expect nor will it tolerate the abuse of its powers or the use of devices beyond that which is reasonable to effect an arrest. The law gives an officer the right to use force or devices dangerous to human life, only in *self-defense*, or the arrest of a felon. *Never in misdemeanors*, and the taking of life is justified only in cases of extreme necessity."

On July 7, 1969, Chief Lux issued a departmental communication addressed to "all commanding officers" which, effective that date, prohibited police officers from discharging their firearms "for the purpose of firing warning shots," due to fear of accidents primarily. This memorandum also repeated the admonition quoted above that weapons should not be fired "except as authorized by law." The memorandum elaborated additionally as follows: "Generally the firing of a weapon constitutes the use of deadly force. Deadly force should be used only when *necessary* to effect the arrest of a felon, prevent the commission of a felony or whenever necessary in self defense." (Emphasis in original.)

In 1969, Lux and Holloman issued a departmental communication to "all personnel" pertaining to arrest procedures following publicity in the newspaper regarding

alleged "police brutality." The memorandum quoted Tenn. Code Ann. § 40-808 [8] and two paragraphs from unspecified Tennessee Supreme Court opinions.[9] The memorandum then concludes:

> "The above law and State Supreme Court decisions are set out as all of us should be constantly reminded of *our* rights and obligations as police officers. Although force is necessary and required in appropriate instances to effect an arrest, defend ourselves and fellow officers, and prevent the escape of fleeing *felons*, we all realize that only that force which is necessary is permitted by law and no more, and none of us wish to use any more force than is necessary." (Emphasis in original).

There appear to have been no other definite formal guidelines or instructions on the use of deadly force prior to or on January 8, 1972, which were directly or indirectly issued or available to MPD patrolmen. Instruction in the training academy with regard to the deadly force arrest powers appears to have been generally in accord with these pronouncements. A more detailed and instructive firearms manual was not prepared until after January, 1972.

Defendant Wyeth Chandler took office as Mayor on January 1, 1972, having been elected in November, 1971. He had been a Memphis City Councilman for four years

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[8] "If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest."

[9] One portion states that "[w]hile an officer may shoot or even kill a *felon*, if that is the only means of taking him or preventing his escape . . . an officer has no right to shoot at one guilty of only a *misdemeanor* to stop his flight or prevent his escape." The second portion states that killing a fleeing felon "will not be justified . . . [if] with diligence and caution the prisoner might otherwise be taken or held . . . ."

and was a practicing attorney. He knew generally what police policies were but made no immediate efforts to change them; and this included the policy authorizing the use of deadly force to effect the arrest of fleeing felons. Defendant Chandler was seeking a director of the police Department and later secured as such Gen Hubbard, a retired Marine Corps officer. Defendant Bill Price was appointed by defendant Chandler to be Chief of Police effective January 1, 1972, and he moved up through the ranks, having joined MPD in 1941.

During the early weeks of the Chandler administration there were several instances of the police shooting at fleeing black suspects, resulting in deaths, but the incident in controversy was the first. This resulted in some controversy, particularly in the black community. Chandler thereafter indicated a review of the guidelines regarding the use of deadly force. A new policy was shortly thereafter adopted authorizing lethal force were necessary in connection with felonies where physical force was being exercised, or in case of murder, manslaughter, arson, rape, burglary, robbery, assault, and kidnapping, or to protect human life including that of a fellow officer. Plaintiff does not object to this subsequent policy apparently to the extent it is confined to the use of deadly force to prevent death or serious bodily injury. Defendant Price participated in the discussions leading to the changed policy adopted in 1972, following this episode, which included meetings at which MPD officials compared the Memphis policy with the policies of others. Some other cities compared in other states had policies which prohibited the use of deadly force for the sole purpose of making an arrest, but the Memphis officials rejected such a policy. One of the bases for this decision was the Tennessee statute and decisions construing it in Tennessee. Defendants Price, Lux and Chandler, as well as Director Hubbard, testified that one of the principal purposes of Memphis' policy re-

garding use of deadly force insofar as they attempt to justify the possible death of fleeing burglary suspects, is to deter criminal conduct.

This policy little changed the prior practices but was more stringent than the state law. One change was to eliminate auto theft from the felonies for which deadly force to arrest was authorized, and perhaps other felonies such as embezzlement. Jay W. Hubbard was later appointed by Mayor Chandler to be Director of Police on December 1, 1972. In 1974, Hubbard issued a new policy with respect to the use of deadly force. The only significant change in the arrest-by-deadly force category was the elimination of grand larceny from the list of felonies in which such force might be exercised. Burglary in the first, second or third degree continues to be on the list where such force where necessary is approved.

The court finds that on January 8, 1972, and at all other times, the policies of the City and MPD authorized the use of deadly force by police officers as a last resort where necessary against fleeing burglary suspects after exhaustion of "all other reasonable means" to make the arrest.

Under the circumstances, although the officers could not be sure, it was reasonable to believe that the crime involved was one against property and not against other persons.

The report of the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (February, 1967), has found that "[i]n most cities police officers receive too little guidance as to when firearms may be drawn and used." [10]

[10] The Commission's essential recommendation in this area was that "A comprehensive regulation should be formulated by every chief administrator to reflect the basic policy that firearms may be used only when the officer believes his life or the life of another

Memphis provides its officers at least as much instruction as the norm from consideration of the evidence. Director Hubbard, however, acknowledged the need for more specific guidelines to govern the use of deadly force which he stated he tried to improve.

The MPD policy, and indeed any police department policy, relies upon the individual officer, acting at his peril to use judgment and reason in making a usually instantaneous decision as to when he should properly use his firearm. It is up to the officer involved in the chase of a suspected felon to decide whether all reasonable alternatives to apprehension have been exhausted before resorting to the last potentially lethal use of the firearm.

The court finds prior to January 8, 1972, MPD officers, including defendants Cox and Richards, did receive training and instructions as to when they legally use deadly force to arrest or apprehend fleeing felony suspects. Some responsible Memphis police officials perceive the use of deadly force to be improper in circumstances where it appears to have been otherwise authorized by written or stated policy, in the case of fleeing felons reasonably suspected of committing a property crime. Police officers (including defendants Cox and Richards) were not effectively instructed as to attempting to wound or disable rather than to shoot at the torso with a greater possibility of inflicting death in the circumstance that would make this feasible. It happened that in this particular instance no such effort would reasonably have been expected to be feasible with Berry and his companion fast disappearing from view.

A juvenile in Tennessee is any person less than 18 years of age. Tenn. Code Ann. § 37-202(1). Juveniles

is in imminent danger, or when other reasonable means of apprehension have failed to prevent the escape of a felony suspect whom the officer believes presents a serious danger to others." This recommendation was not, of course, binding on any defendant.

ordinarily no not commit crimes in the same legal context as adults; their wrongful acts, if the equivalent of adult crimes, are usually designated "delinquent acts." Tenn. Code Ann. § 37-202(3). Juveniles who commit delinquent acts may, however, be tried and punished as adults if they are 16 or more years of age,[11] if found not amenable to treatment or rehabilitation as a juvenile and the interests of the community require that he be placed under legal restraint. Tenn. Code Ann. § 37-234. Unless treated as an adult, an adjudication of delinquency is not equivalent to a conviction of crime and does not impose the same civil disability ordinarily resulting from a conviction. Tenn. Code Ann. § 37-233.

Death has not been the punishment for burglary in Tennessee under any circumstances, either before or since *Furman* v. *Georgia*, 408 U.S. 238 (1972). The maximum punishment would be ten years unless armed in which case it would be fifteen.

Although the MPD manual used for in-service training in connection with firearms policies makes no mention of a juvenile-adult distinction, responsible MPD officials and defendant Chandler testified there was in fact such a distinction in treatment and that known juveniles would be fired upon only in instances where physical violence were being employed and only as a last resort.

Memphis police officers should receive more specific formal training or instruction to avoid using deadly force to arrest persons known or thought to be juveniles. Defendants Richards and Cox did not act unreasonably under these circumstances in dealing with Berry and his partners in crime without recognizing them or two of them to be juveniles. They had no reasonable opportunity for close examination or scrutiny; Berry was actively engaged in a felony, and he fled from the scene into darkness or semi-darkness rapidly disobeying explicit commands to stop.

[11] In case of murder, rape, kidnapping, or robbery with a deadly weapon, a 15 year old juvenile may be treated and tried as an adult.

SUMMARY AND CONCLUSIONS AS TO PLAINTIFF'S ASSERTIONS AS TO DEFENDANTS COX AND RICHARDS AND THE USE OF DEADLY FORCE UNDER THE CIRCUMSTANCES

I. Freddie Lee Berry was engaged in a felony and was actually observed by defendants Cox, Richards and other officers while in the progress of a burglary on the night of his untimely death, January 8, 1972. Tennessee Law, adopted by City of Memphis officials charged with police responsibilities, (including defendants,) permits an officer in these circumstances to "use all the necessary means to effect the arrest." Berry deliberately fled, and his companion escaped from the scene, despite repeated commands to halt heard by a neighbor some distance away. In the rain and darkness with chain link fences interfering with pursuit, the officers had no reasonable means to pursue the fleeing felons with any feasible expectation of effecting their apprehension. There was very little reasonable opportunity of identification of the two for purposes of future arrest if they escaped. Officers Richards and Cox gave notice of their intention to apprehend defendant who then fled.

II. The officers had a right to use force to prevent escape and to effect the arrest. T.C.A. 40-808. *Beech* v. *Melancon*, 465 F.2d 425 (6th Cir. 1972). The use of reasonable force does not amount to unconstitutional punishment nor does it per se violate due process. *Cunningham* v. *Ellington*, 323 F.Supp 1072 (Three Judge Court, W.D. Tenn. 1971). The defendants, moreover, were entitled to presume the constitutionality of the more than one hundred year old Tennessee statute and a City policy in con-

formity therewith. *Beech* v. *Melancon, supra.* When the police officer uses force in the case of a fleeing felony suspect he acts, however, at his peril, in that he cannot use unreasonable, unnecessary, arbitrary or excessive force under the circumstances. *Ford* v. *Wells*, 347 F.Supp. 1026 (E.D. Tenn. 1972); *Beech* v. *Melancon, supra; Love* v. *Bass*, 145 Tenn. 522 (1921); *Scarbrough* v. *State*, 168, Tenn. 106 (1934).

The defendants, Cox and Richards, employed the only practicable means available to them under peculiarly difficult circumstances requiring split second judgment to prevent the deliberate attempt to escape of one caught in the midst of a felonious burglary. Plaintiff failed to carry the burden of proving that Cox or Richards either knew or should have known that Berry was a juvenile. These officers could not surely have known whether defendants were or were not armed, and it later developed that stolen weapons were indeed nearby and available to them. To ascribe to plaintiff's counsel's contentions under these facts would be to recognize a felon's constitutional right to escape if the only reasonable and practicable means to prevent it were to employ potentially lethal force by use of a firearm. This is indeed borne out by Lurry's successful escape under these identical circumstances. In a real sense, this court is being called upon by plaintiff to rule the allowable Tennessee law procedures, more stringently applied in Memphis by the MPD, to be declared unconstitutional in the face of a three judge court's contrary determination [12] less than a year before this episode. This court agrees with the opinion there expressed, 323 F.Supp. 1075, that "this is a policy decision for the Tennessee legislature or perhaps the Tennessee courts and not for federal courts in the guise of constitutional adjudication." Compare the concurring opinion of Judge

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[12] *Cunningham* v. *Ellington, supra,* (including Chief Judge Harry Phillips.)

McCree in *Beech* v. *Melancon, supra.* In any event, Cox cannot be held liable because his actions caused no harm or damage to plaintiff. Berry died shortly after he was shot without gaining consciousness. Nor can the court hold the other defendants liable under the circumstances for constitutional or illegal deprivation of plaintiff's rights. This is not to indicate, however, that under other circumstances, some of the defendants might not be liable for use of lethal force employed against a fleeing felon, particularly where there were a reasonable opportunity to warn, wound, or disable rather than risk killing such a person for arrest or apprehension. This court makes no order granting plaintiff relief and issues no declaratory judgment as requested by plaintiff's counsel in light of its findings and conclusions, although this court earnestly hopes the MPD will reconsider its present policy with regard to firing of warning shots and the instruction of police officers to shoot to disable, if and where practicable, in cases of fleeing felons. It should be noted that neither party has requested the reconsideration of the policy against use of warn-shots in certain situations such as the case of a fleeing felon.

Next the court turns to plaintiff's contentions that defendants' policies of firing at fleeing felons amounts to illegal and unconstitutional racial discrimination. Plaintiff cites the language of the Commission on Law Enforcement appointed by President Johnson that "it may be paradoxical that the same people who are most victimized by crime are most hostile to the police," *The Challenge of Crime in a Free Society*, p. 99 (1967), but it notes this is not remarkable because of ghetto poverty conditions to which many blacks and Spanish speaking Americans are subject. The Executive Secretary of the Memphis Branch of the N.A.A.C.P. testified that in her opinion she and other blacks in past years had been the subject of discrimination enforced by police, and that blacks are therefore more resentful against police than

are whites, more likely to be victims of excessive force, and more subject to be fearful of police. Events in Memphis prior to 1972 would have made Memphis authorities aware of the black community's complaints against alleged police abuse. It was the formal position of some Memphis black leaders that police officers "should retain the power to use deadly force only in the defense of human life," and that the death penalty be abolished.

The asserted fact that young blacks generally fear and mistrust Memphis police officers, even if true, forms no justification or excuse for commission of crime by blacks, nor does it excuse Berry for running away from the scene of his crime contrary to express police directions in an effort to escape arrest. Berry's possible subjective fear and mistrust of police could not be said to be based entirely on this particular episode; he had a record of prior involvement with the police and/or juvenile authorities, and this was not due to any showing by plaintiff of his having been mistreated or abused by the police [13] or by juvenile or school authorities rather than his own inclinations and wrongful tendencies from a very young age.

Plaintiff relies, however, upon statistical evidence to reflect that the effect of the policy allowed by Tennessee law and followed in Memphis was to discriminate against blacks. Plaintiff contends that because seven of ten persons arrested for property crimes, including burglary, were black in Memphis prior to this episode, and because seven of eight persons fired upon by Memphis police as fleeing "property crime" felons were black, this disproportion indicates that the policy in dispute of utilizing potential deadly force is applied discriminatorily, or that it results in impermissable illegal constitutional de-

[13] There is no showing here of any racial bias or anti-black attitude by defendant police officers on January 8, 1972, or before that date.

privation.[14] Of course, the court cannot know what proportion of blacks or whites sought to be arrested while in the act of burglary or robbery attempted to flee or to avoid arrest by Memphis police officers.[15] If, as plaintiff also argues, more Memphis blacks are disposed to flee, especially young blacks, because of fear and/or mistrust of police, then it would logically follow that a higher proportion of blacks would be involved in the necessary use of force by police to prevent escape or to effect apprehension. This, if true, would not amount to discriminatory application of a lawful policy by police, if they reasonably and properly (and lawfully) also first sought to utilize every other legitimate means of effecting arrest before the last alternative of using a firearm.

Again, plaintiff has failed to persuade the court that under the circumstances of this case defendants have discriminated against her or against her son because of their race. Equitable relief sought is accordingly denied despite commendable efforts on the part of plaintiff's counsel to define and to prove a cause of action based upon Freddie Lee Berry's untimely death.

The court declines to find subject matter jurisdiction over plaintiff's constitutional claims in this case by virtue of 28 U.S.C. § 1331(a). *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973). The court is reluctant to exercise pendant jurisdiction, although plaintiff's state court claims against all defendants fail under the conclusions herein reached. This court, in the absence of legislative determination by the State of Tennessee, cannot conclude

[14] Plaintiff's figures show seven out of nine fleeing "property crime" felony suspects killed by Memphis police in trying to apprehend were black.

[15] It is noteworthy that within two months prior to the episode in question, according to incidents with dates specified in Exhibit 19A, Memphis policemen fired four occasions at fleeing burglary suspects; two involved whites, two involved blacks.

that a police officer is never justified under any circumstances in using potentially deadly force against a person, black or white, suspected of committing a felonious crime against property. The fact that Berry was a juvenile at the time, in light of the circumstances, was not reasonably known to the defendant police officers. Even if they suspected Berry was a juvenile, however, it would not necessarily follow that the crime committed here was equivalent to a misdemeanor, particularly in light of Berry's background as a delinquent and the right to try him as an adult. Neither did the defendants City and MPD waive immunity for suit against them by reason of T.C.A. 6-640 requiring limited indemnification.

Plaintiff's fourth amendment claim here based on unreasonable "seizure" of Berry is meritless. Certainly under these facts the officers had a right to arrest Berry and to search him for stolen property or weapons and to seize him and any stolen contraband. No federal case cited by plaintiff has construed this amendment to apply to this type of situation. *Terry* v. *Ohio*, 392 U.S. 1 (1968) involved a policeman's stopping and frisking suspects under suspicious circumstances where no crime was committed in his presence nor yet reported to him. Others involved suppression of illegally obtained narcotics or alleged kidnapping by authorities in a foreign jurisdiction. This court does not conclude that the policy of using all necessary force, including use of potentially deadly force to bring about arrest, as a last resort, of a fleeing felon is per se unreasonable and unconstitutional. As previously noted, *Cunningham* v. *Ellington*, *supra*, has settled plaintiff's eighth amendment "cruel and unusual punishment" claim contrary to her contentions.

Plaintiff also contends that there was a denial of fourteenth amendment rights. See, however, *Cunningham* v. *Ellington*, *supra*. Plaintiff cites as authority a number of cases involving beatings and gross mistreatment of

prisoners or suspects *in custody* by jailers or police.[16] The authority cited is not appropriate to indicate a denial of due process in the efforts of police to capute or arrest a known burglary suspect not in custody who was deliberately flouting repeated commands to stop. Neither, under the circumstances, has it been demonstrated that defendants' policies, permitted under Tennessee law, bring about a denial of equal protection. No racial animus or basis is shown to motivate the policy involved. Both white and black fleeing felons have been shown by plaintiff's own proof to have been fired upon or shot by Memphis police as a matter of last resort where otherwise arrest cannot be reasonably accomplished and escape is inevitable, even in the case of so-called property crimes.

Judgment therefore will be entered for all defendants. Costs will be assessed against plaintiff.

This 30 day of June, 1975.

/s/ Harry W. Wellford
United States District Court Judge

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[16] The only one not involving an actual in custodia situation was *Jenkins* v. *Averett*, 424 F.2d 1228 (4th Cir. 1970). There a black youth who had stopped pursuant to police command and chase, in police car headlights, was shot. He had committed no crime according to the Court of Appeals.